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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-5532

HAROLD STRUBE,
Appellant

vs.

DALE SUMNER,
Appellee

ON APPEAL FROM THE SUPREME COURT
OF INDIANA

JURISDICTIONAL STATEMENT

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October 22, 1979

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	4
Raising the federal question	6
Statement of the case	6
The question is substantial	9
Conclusion	21
Appendix	A1

CITATIONS

Cases:	Page
Bullock v. Carter, 405 U.S. 134 (1972)	12
Califano v. Goldfarb, 430 U.S. 199 (1977)	11
Caulk v. Nichols, 281 A.2d 24 (Del., 1971), App. Dis., 408 U.S. 901 (1971)	20,21
Chambers v. Baltimore Ohio R. Co., 207 U.S. 142 (1908)	12
Craig v. Boren, 429 U.S. 190 (1976)	11
Frontiero v. Richardson, 411 U.S. 677 (1973)	11
Griffin v. Illinois, 351 U.S. 12 (1956)	14,15
Griffiths, In Re, 413 U.S. 717 (1973)	2
Hayes Freight Lines, Inc. v. Oestericher, 117 In. App. 143, 68 N.E.2d 792 (1946)	19,20
Huey v. Milligan, 242 Ind. 93, 175 N.E.2d 698, 700 (1961)	18
Jiminez v. Weinberger, 417 U.S. 628 (1974)	11
Lathrop v. Donohue, 367 U.S. 780 (1961)	2,3
Lindsey v. Normet, 405 U.S. 56 (1972)	10,15,16,17
Loving v. Virginia, 388 U.S. 1 (1967)	10
Marcus v. Search Warrants, 367 U.S. 717 (1961)	2
Mayer v. City of Chicago, 404 U.S. 189 (1971)	2
Ortwein v. Schwab, 410 U.S. 656 (1973)	15,16
Reed v. Reed, 404 U.S. 71 (1971)	11
Rinaldi v. Yeager, 384 U.S. 305 (1966)	15,16,17,19
Shapiro v. Thompson, 394 U.S. 618 (1969)	10
Strube v. Sumner, 385 N.E.2d 948 (Ind. App., 1978)	6,13,14,16,19
Trimble v. Gordon, 430 U.S. 762 (1977)	11,13
Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972)	10,11,13

Constitutional Provisions: Page

United States Constitution, Fourteenth Amendment, Section I . . . . . Passim

Statutes:

United States Code, Title 28 §1257(2) 2

Indiana Code

IC 23-2-1-19 14
IC 33-4-4-3 16
IC 33-5-35-6 16
IC 33-6-1-2 16
IC 33-10.5-1-1 9
IC 33-10.5-7-10 9
IC 33-11.6-4-2 7
IC 33-11.6-4-3 8
IC 33-11.6-4-5 3
IC 33-11.6-4-8 8
IC 33-11.6-4-9 8
IC 33-11.6-4-14 8

Rules:

Indiana Rule of Appellate Procedure 6(B) 8,16

Marion County Small Claims Rules 16(B) . . . . . Passim

Articles:

A First Amendment Right of Access to the Courts for Indigents, 82 Yale L.J. 1055 (1973) 12

Karst, The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harvard L.R. 1 (1977) 11

Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights, Part I, 1973 Duke L.J. 1153 Part II, 1974 Duke L.J. 527 12

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JURISDICTIONAL STATEMENT

Harold Strube, the appellant, appeals from the final judgment of the Supreme Court of Indiana, dated July 23, 1979, denying his petition for transfer from the Indiana Court of Appeals. The Court of Appeals issued an opinion dated December 20, 1978 holding that Rule 16(B) of the Marion County, Indiana, Small Claims Court Rules, as applied in this case, did not violate appellant's right to the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The order of the Indiana Supreme Court denying transfer is unreported. The opinion of the Indiana Court of Appeals, which appears in the appendix hereto, is reported at 385 N.E.2d 948 (Ind. App., 1978).

JURISDICTION

The judgment of the Indiana Supreme Court, denying transfer from the Indiana Court of Appeals, was entered on July 23, 1979. The opinion of the Indiana Court of Appeals sustaining the validity of the Marion County Small Claims Court appeal bond rule was rendered on December 20, 1978. Appellant's petition for rehearing was denied by the Indiana Court of Appeals on April 17, 1979.

A notice of appeal to this Court was filed in the Supreme Court of Indiana within 90 days of the date of the Indiana Supreme Court's ruling on the petition for transfer.

This appeal is being docketed in this Court within 90 days of the denial of transfer below. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2) which grants this Court authority to review, on appeal, a judgment of a state court "where [there] is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution. . .cf the United States, and the decision is in favor of its validity." Here the appellant mounts a constitutional challenge to a rule of court; however, prior decisions of this Court reveal that rules of court should be considered "statutes" for purposes of 28 U.S.C. §1257(2). Marcus v. Search Warrants, 367 U.S. 717 (1961) (state court rule supplementing statutory procedures for seizure of personal property); In Re Griffiths, 413 U.S. 717 (1973), (state court rule prohibiting aliens from taking bar exam); Mayer v. City of Chicago, 404 U.S. 189 (1971), (state court rule interpreted as denying free transcripts to indigents); cf. Lathrop v. Donohue, 367 U.S. 780 (1961), (Wisconsin Supreme Court order integrating the Wisconsin Bar). In Lathrop, the Court held that the controlling factor in these circumstances is not the source of the enactment, but whether the enactment was legislative in nature:

> Under [§1257(2)], the legislative character of challenged state action, rather than the nature of the agency of the State performing the act, is decisive of the question of jurisdiction. It is not necessary that the state legislature itself should have taken the action drawn in question. In construing the similar jurisdictional provision in the Judiciary Act of 1867, 14 Stat. 385, we said: "Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court." Williams v. Bruffy, 96 U.S. 176, 183, 24 L.Ed. 716. We likewise said of the provision of the Act of 1925, 43 Stat. 936, which is the present §1257(2) "* * *the jurisdictional provision uses the words 'a statute of any state' in their larger sense and is not intended to make a distinction between acts of a state legislature and other exertions of the State's law-making power, but rather to include every act legislative in character to which the state gives its sanction." King Manufacturing Co. v. City Council, 277 U.S. 100, 104-105, 48 S.Ct. 489, 490, 72 L.Ed. 801.

Lathrop v. Donohue, 367 U.S. at 824. This Court was satisfied that the state court's order was indeed legislative in nature because it had been "effected through an interplay of action by the legislature and the court. . . ." Id. at 825. The rule challenged in the present case was promulgated by the Marion County Circuit Court pursuant to the statutory mandate of the Indiana legislature. IC 33-11.6-4-5:

> The judge of the circuit court, assisted by the judges of the Small Claims Court, shall make and adopt uniform rules for conducting the business of the Small Claims Court and for appeals therefrom. . . . (Emphasis added).

It is of no consequence that the enactment in question is not one of statewide application. This Court has upheld its jurisdiction on appeal of challenges to municipal ordinances. King Manufacturing Co. v. City Council, supra.

The Supreme Court has jurisdiction on appeal to review the judgment of the lower court in this case. However, should the Court hold otherwise, appellant respectfully requests that this application for review be treated as a petition for certiorari pursuant to 28 U.S.C. §2103.

QUESTIONS PRESENTED

1. Whether classifications affecting the administration of justice should be subject to a more exacting level of Equal Protection scrutiny than mere rationality.
2. Whether Rule 16(B) of the Marion Small Claims Court Rules, Marion County, Indiana, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in requiring defendant-appellants from the Marion County, Indiana, Small Claims Court to post an appeal bond as a jurisdictional prerequisite to appeal when appellants from all other courts in the state, including those from the Marion County civil trial courts, are exempt from such a requirement and where plaintiffs in Marion County can impose this disadvantage on defendants by their selection of a forum.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Section I, Fourteenth Amendment, United States Constitution:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IC 33-11.6-4-5:

> Adoption of Rules. The judge of the circuit court, assisted by the judges of the small claims courts, shall make and adopt uniform rules for conducting the business of the small claims court and for appeals therefrom according to a simplified procedure and in the spirit of sections 6 and 8 of this chapter.

IC 33-11.6-4-14:

> Appeals. All appeals from judgments of the small claims court shall be taken to the circuit or superior courts of the county and tried de novo. All appeals from proceedings under IC 1971, 33-11.6-6 shall be taken to a criminal court of the county and tried de novo. Rules of procedure for appeals shall be in accordance with the rules established by the circuit court.

IC 33-11.6-4-14 (amended effective January 1, 1979):

> All appeals from judgments of the small claims court shall be taken to the circuit or superior court of the county and tried de novo. Rules of procedure for appeals shall be in accordance with the rules established by the circuit court.

Rule 6(B), Indiana Rules of Appellate Procedure:

> No appeal bond shall be necessary to perfect an appeal from any judgment or appealable interlocutory order. Enforcement of a judgment or appealable interlocutory order, however, will be suspended during appeal upon the giving of an adequate bond with approved sureties. The trial court or judge thereof shall have jurisdiction to fix and approve the bond and order a stay pending an appeal as well as prior to the appeal. If the stay is denied by the trial court or judge thereof, the appellate tribunal may reconsider the application at any time after denial upon a proper showing by certified copies of the trial court's action and grant or deny the same and fix the bond. Provided, however, no bond shall be required from a governmental organization as provided in Trial Rule 62(E). Nothing herein shall be construed as giving a right to stay, by giving such bond, any judgment or order which cannot now be stayed and suspended by the giving of an appeal bond.

Rule 16(B), Marion Small Claims Court Rules, Marion County, Indiana:

> The appellant shall, except in cases where the same is dispensed with by law, file with the court a bond, with security to be approved by the judge, payable to the appellee, in a sum sufficient to secure the claim of the appellee and interests and costs, conditioned that he will prosecute his appeal to effect, and pay the judgment that may be rendered against him in the circuit court.

RAISING THE FEDERAL QUESTION

The Equal Protection challenge to the appeal bond rule was first raised in oral argument, in the Marion County, Indiana, Superior Court, on appellee's motion to vacate the order granting leave to proceed without posting an appeal bond. The Equal Protection question was raised again in appellant's post-trial motion to correct errors and memorandum in support thereof, in his brief to the Indiana Court of Appeals, in his brief in support of his petition for rehearing, and again in his brief in support of his petition for transfer to the Indiana Supreme Court.

The only written opinion issued during the course of these proceedings was that of the Indiana Court of Appeals. The Court of Appeals held: "We must also reject Strube's equal protection argument that Rule 16(B) is constitutionally invalid since it discriminates between Marion County Small Claims appellants and all other appellants in the State (Footnote omitted)." Strube v. Sumner, 385 N.E.2d 948, 950 (Ind. App., 1978). Thus, Strube's Equal Protection argument was considered and expressly rejected.

STATEMENT OF THE CASE

This action was initiated on December 13, 1976, in the Marion County Small Claims Court, Washington Division, by Dale Sumner against Harold Strube to recover $1,150.00 in

damages plus costs and interest arising from an automobile accident between the parties on April 30, 1976. A trial was held on March 21, 1977, and judgment in the amount of $1,179.04 plus costs was rendered for plaintiff Sumner on March 22, 1977.

On March 29, 1977, defendant Strube moved the Superior Court of Marion County for leave to appeal without the payment of a filing fee or the posting of an appeal bond. Strube's verified motion revealed that his sole source of income was $40.00 per week in unemployment compensation and that his wife and five month old child were totally dependent upon him for support. The motion was granted on March 29, 1977, by the Honorable Michael Dugan, Judge of the Marion County Superior Court.

On April 22, 1977, Strube filed his notice of appeal and praecipe in the Small Claims Court. Plaintiff Sumner filed a motion in the Marion County Superior Court to vacate that part of the Court's order waiving the appeal bond. On May 16, 1977, Judge Dugan vacated that portion of his order of March 29 which permitted Strube to appeal without posting an appeal bond; however, that portion of the previous order allowing Strube to appeal without payment of a filing fee remained undisturbed.

On May 16, 1977, the Small Claims Court set an appeal bond in the amount of $1215.04.

On June 9, 1977, plaintiff Sumner moved to dismiss the appeal, and the appeal was dismissed on June 13, 1977.

The court in which this action originated, the Marion County Small Claims Court, Washington Division, is part of a system of small claims courts which is unique in Indiana. The jurisdiction of these small claims courts is limited to actions in contract or tort where the damage or debt claimed does not exceed $1500.00, IC 33-11.6-4-2, and to possessory actions where the amount of past due rent does not exceed

$1500.00, IC 33-11.6-4-3. No juries are provided for in small claims courts, IC 33-11.6-4-9. The courts are not bound by statutory provisions or rules of practice, procedure, pleadings, or evidence, IC 33-11.6-4-8.

IC 33-11.6-4-14 provides for appeals from the judgments rendered by the Marion Small Claims Court:

> All appeals from judgments of the small claims court shall be taken to the circuit or superior court of the county and tried de novo. All appeals from proceedings under IC 1971, 33-11.6-6 shall be taken to a criminal court of the county and tried de novo. Rules of procedure for appeals shall be in accordance with the rules established by the circuit court.[1]

Pursuant to the powers conferred on it by the foregoing statute, the Marion County Circuit Court promulgated Marion County Small Claims Rule 16(B), which states:

> The appellant shall, except in cases where the same is dispensed with by law, file with the court a bond, with security to be approved by the judge, payable to the appellee, in a sum sufficient to secure the claim of the appellee and interests and costs, conditioned that he will prosecute his appeal to effect, and pay the judgment that may be rendered against him in the circuit court.

In contrast, Rule 6(B), Indiana Rules of Appellate Procedure states the bond requirement for other Indiana litigants:

> No appeal bond shall be necessary to perfect an appeal from any judgment or appealable interlocutory order. Enforcement of a judgment or appealable interlocutory order, however, will be suspended during appeal upon the giving of an adequate bond with approved sureties.

This rule, dispensing with any bond requirement on appeal, except where a supersedeas is sought, is applicable not only to all trial courts in Indiana, but also to the jurisdictional counterpart of the Marion County Small Claims Court in other counties in Indiana, the county courts or small claims dockets of Superior Courts,[2] by virtue of IC 33-10.5-7-10:

> An appeal of a judgment from the county court shall be taken in the same manner and under the same rules and statutes and with the same assessment of costs as cases appealed from circuit court.

Contending that the disparate treatment on appeal accorded him and other Marion County Small Claims Court defendant-appellants, as compared with other Indiana litigants, denied him the equal protection of the laws guaranteed by the state and federal constitutions, Strube filed a motion to correct errors, pursuant to Indiana Trial Rule 59, with the Superior Court, seeking reinstatement of his appeal on July 28, 1977. His motion was denied on July 29, 1977. Strube filed a praecipe for appeal on August 24, 1977. On December 20, 1978, the Indiana Court of Appeals ruled against the defendant. On July 23, 1979, the Indiana Supreme Court denied Strube's Petition for Transfer, thereby affirming the judgment of the Indiana Court of Appeals.

THE QUESTION IS SUBSTANTIAL

A

CLASSIFICATIONS AFFECTING THE ADMINISTRATION OF JUSTICE SHOULD BE SUBJECT TO A MORE EXACTING LEVEL OF EQUAL PROTECTION SCRUTINY THAN MERE RATIONALITY

The promulgation of the appeal bond Rule governing appeals from the Marion Small Claims Court to the Marion County

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[1] This statute was amended as of January 1, 1979, by deletion of the second sentence. The deleted sentence was not relevant to the issues in this case.

[2] County Courts and Small Claims dockets in Superior Courts in Indiana counties other than Marion are created by the County Court Act, IC 33-10.5-1-1 et seq.

Circuit and Superior Courts has arbitrarily isolated the Marion Small Claims appellant from the mainstream of appellate procedure in Indiana as well as from that of Marion County itself. The de facto classification implicitly created by the appeal bond Rule consists of all Marion Small Claims Court litigants vis a vis litigants in all other courts of the State of Indiana, including the trial courts of Marion County.

Strube contends that the classifications in this case, as well as the governmental purposes advanced to justify them, must be measured against a more stringent standard than mere rationality and that plaintiff-appellee should accordingly be required to demonstrate that the classifications are substantially related to these underlying justifications, particularly where, as here, the choice of a forum is in the hands of the plaintiff.

Where a governmentally created classification is neither suspect nor operates to affect a fundamental right, the rule of law will withstand constitutional review so long as the state can show that it bears a rational relationship to a legitimate governmental purpose. Lindsey v. Normet, 405 U.S. 56 (1972); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164. (1972). Where government action has created a suspect classification or where an individual has a fundamental right at stake, this Court has held that the state must show that the legislative enactment in question is necessary to vindicate a compelling state interest. Loving v. Virginia, 388 U.S. 1 (1967), (race as a suspect classification); Shapiro v. Thompson, 394 U.S. 618 (1969), (interstate travel as a fundamental right).

In recent years, this Court has expanded its traditional equal protection analysis by identifying a number of areas in which a level of scrutiny more exacting than mere rationality but less demanding than suspectness is appropriate. Such

scrutiny has been applied to cases involving illegitimacy, such as Jiminez v. Weinberger, 417 U.S. 628 (1974), Weber v. Aetna Casualty and Surety Co., supra, and Trimble v. Gordon, 430 U.S. 762 (1977); as well as to cases involving sex discrimination such as Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190 (1976); and Califano v. Goldfarb, 430 U.S. 199 (1977). In these cases, the Court closely examined the relationship between the discriminatory classifications and the purposes advanced to justify them and found either no evidence that the classification furthered the end or that the means did not substantially further the ends the legislature purportedly had in mind. In Craig v. Boren, supra, the Court specifically held that in order "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." 429 U.S. at 197. On these and other occasions, the pronouncements of this Court "have made clear that the degree of suspectness of a classification is chiefly determined by the degree to which the classification interferes with the interest in being treated as a person who belongs to the society as a respected, responsible and participating member." Kenneth L. Karst, The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harvard L.R. 1, 26 (1977).

Classifications impairing an individual's ability to redress a wrong or to raise a defense in the judicial system are deserving of at least the same intensified level of scrutiny accorded to the victims of discrimination in the aforementioned categories of cases:

> The right to sue and defend in the Courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest

> and most essential privileges of citizenship. . . .

Chambers v. Baltimore and Ohio R. Co., 207 U.S. 142, 148 (1908), dicta. Commentators have elaborated on the essential role that equal and open access to the courts plays in giving life to the concept of citizenship in our participatory form of government, see Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights, Part I, 1973 Duke L.J. 1153, and Part II, 1974 Duke L.J. 527, and have concluded that barriers to access may not only result in "considerable individual hardship (footnote omitted), but diminished respect for the law as well." A First Amendment Right of Access to the Courts for Indigents, 82 Yale L.J. 1055, 1066 (1973).

Wealth is yet another factor which has been considered by the Court in determining the level of equal protection scrutiny to be applied to a particular case. In Bullock v. Carter, 405 U.S. 134 (1972), where the validity of a state primary election filing fee was at issue, the Court observed that while "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review," 405 U.S. at 143, because the filing fee in question had a significant impact on the right to vote and because that impact was "related to the resources of the voters supporting a particular candidate," the filing fee requirement would be "closely scrutinized." Id at 144. As in Bullock, the present case presents the obvious likelihood that the hardship created by the appeal bond Rule will fall more heavily on the less affluent segment of the community. Id. Accordingly, the Court should consider that likelihood in fashioning the standard by which the classification in the instant case must be judged.

However, despite Strube's argument to the lower courts that they should take into account the nature of challenged rule, i.e. that it governs the administration of justice, and that they should therefore apply a more stringent standard of review to the discriminatory classifications affecting him, the Indiana Court of Appeals decided the case on the simple ground "that rules or statutes of limited geographical applicability are not automatically constitutionally void under the equal protection clauses merely because they are 'different'". Strube v. Sumner, 385 N.E.2d 948, 951 (Ind. App., 1978).

The sensitive nature of the right at stake together with the severe impact of the challenged rule on those unable to afford the price of justice distinguish the facts of the present case from other conceivable challenges to less important aspects of the Marion Small Claims Court system, and this combination of circumstances invites a more exacting equal protection analysis of the classifications created by the rule.

> ". . .[W]hen state statutory classifications approach sensitive and fundamental rights, [the United States Supreme Court] exercises a stricter scrutiny. . . .

Weber v. Aetna Casualty & Surety Co., supra, at 172, quoted in Trimble v. Gordon, 97 S.Ct. at 1463. This case does not involve a challenge to some minor rule of procedure which governs practice in the Marion Small Claims Court. The rule to which appellant takes exception is of great moment to his "life" or "death" as a litigant since the appeal bond requirement has effectively and finally terminated his pursuit of justice in this case. Accordingly, Strube's argument has virtually no implications for other rules or statutes of non-uniform application, unless they touch on "sensitive and fundamental rights." Certainly, classifications which affect the

administration of justice should be among those which trigger a higher level of scrutiny than the minimum "rational relationship to a legitimate state interest."

B

ONCE AN APPEAL HAS BEEN GRANTED BY STATUTE IT MAY NOT BE ARBITRARILY ABRIDGED BY THE IMPOSITION OF DISCRIMINATORY CLASSIFICATIONS

Appellant Strube contends that Marion County Small Claims Rule 16(B) creates two classifications of persons: defendant-appellants in the Marion County Small Claims Courts, who are required to post a bond in order to appeal, as opposed to almost all[3] other litigants in the State of Indiana, who need not post a bond in order to appeal. Appellant contends that this Rule cannot survive a heightened degree of scrutiny under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, in that the classification created by the rule does not substantially further an important governmental interest. Moreover, appellant contends that even if the Court rejects his argument for a heightened degree of scrutiny in this case, the Rule still cannot be sustained under even the most minimal level of scrutiny, in that the classification created by the rule is not rationally related to a legitimate state interest.

It is entirely clear from the Supreme Court's decisions that states have no constitutional obligation to provide appeals, but that once appeals are granted by the state, they cannot be arbitrarily denied to some litigants. Griffin v.

[3]In its opinion in the instant case, the Indiana Court of Appeals points out that Indiana statutes provide for an appeal bond in the amount of $500 for one other class of litigants -- persons seeking judicial review of an administrative decision denying an application for registration of an issue of securities. IC 23-2-1-19. The Court of Appeals did not suggest that the presence of another exception to the general rule derogates from appellant Strube's claim that his appeal rights are different from those of the vast marjority of Indiana litigants. See Strube v. Sumner, 385 N.E.2d 948 at 950, n.7 (Ind. App., 1978).

Illinois, 351 U.S. 12 (1956). In the criminal area, any financial impediment to appeal will violate the Equal Protection clause through its discriminatory effect on poor people. Griffin, supra. On the other hand the unfettered right to civil appeals has not received such blanket protection from the Supreme Court; the Supreme Court has upheld a financial impediment to a civil appeal where it was nondiscriminatorily imposed on almost all civil litigants. Ortwein v. Schwab, 410 U.S. 656 (1973). However, the Court has struck down an appeal bond requirement where it was imposed only on a specific class of litigants, leaving the majority of litigants in the state exempt, Lindsey v. Normet, 405 U.S. 56 (1972).

In Lindsey the Supreme Court considered an Oregon statute requiring tenants in possessory actions to post a bond, in addition to the normal bonds required on appeal in Oregon, in an amount twice the rental value of the premises at issue, computed from the commencement of the action to final judgment. Noting that the statute erected "a substantial barrier to appeal faced by no other civil litigant in Oregon," Lindsey, at 79, the Supreme Court sought for some rational justification for distinguishing tenant-appellants from other litigants, and found none.

Similarly in Rinaldi v. Yeager, 384 U.S. 305 (1966), the Supreme Court considered a New Jersey statute which provided that the costs of a transcript used on an unsuccessful appeal by an indigent convict confined to an institution could be recouped by the county out of the convict's wages, but made no similar provision for recoupment of costs from convicts not confined to state institutions. Finding it unnecessary to determine whether this statute impermissibly burdened an indigent's right to appeal a criminal conviction, the Court instead focused on the distinction the statute created between institutionalized and noninstitutionalized

convicts, and, finding no rational justification for the discriminatory effect on the institutionalized, the Court struck down the statute.

Thus, while a financial inhibition that burdens civil appeal rights does not, by its automatically disadvantageous effect on the poor, violate the Equal Protection clause, Ortwein, supra, the Supreme Court has held invalid statutes that single out a specific class of litigants for disadvantageous treatment on appeals. Appellent Strube contends that his case falls within the constitutional principle set forth in Lindsey and Rinaldi. The discriminatory bond in Lindsey was based on the subject matter of the case; in Rinaldi, a type of person was singled out for disadvantageous treatment; in Strube, the appellant is disadvantaged by reason of the particular court within the state judicial system in which the plaintiff chose to sue him.

It is noteworthy that Strube is disadvantaged at the whim of the plaintiff. Sumner's action against Strube could have been filed in the Marion County Municipal, Superior, or Circuit Courts, which have concurrent original jurisdiction, with the Marion County Small Claims Court over tort actions involving the amount of damages here claimed by Sumner. See IC 33-6-1-2 (jurisdiction of Marion County Municipal Courts); IC 33-5-35-6 (jurisdiction of Indiana Superior Courts); IC 33-4-4-3 (jurisdiction of Indiana Circuit Courts). If Sumner had filed this action in one of these courts, instead of in the Small Claims Court, Strube's appeal rights would then, of course, have been determined by Indiana Rule of Appellate Procedure 6(B), supra, instead of by Marion County Small Claims Rule 16(B). Thus, by choosing to file his claim in small claims court instead of in the Marion County trial court, the plaintiff obtains a significant restriction of the defendant's appeal rights.

In the opinion below, the Indiana Court of Appeals suggested several justifications for the restriction of Strube's appeal rights:

> . . .the mere fact that Marion is the most populous county in the state and logically, therefore, one of the most litigious, arguably justifies imposing an appeal bond which may tend to discourage patently insubstantial appeals.

358 N.E.2d at 952. What the Court implies but leaves unspoken is the conclusion that somehow the Marion Small Claims Court defendant-appellant is more likely to pursue frivolous appeals than his counterpart in other courts, and therefore the appeal bond rule can be justified on this basis. There is absolutely nothing in the record or in logic to suggest that the proportion of frivolous appeals is higher in Marion County than elsewhere.

The Supreme Court has dealt with the contention that an appeal bond serves a legitimate state interest by deterring frivolous appeals in both Rinaldi and Lindsey, supra. In Rinaldi the Court said:

> Apart from its fiscal objective [of reimbursing the county for the cost of a transcript], the only other purpose of this law advanced by the appellees is the deterrence of frivolous appeals. Assuming a law enacted to perform that function to be otherwise valid, the present statutory classification is no less vulnerable under the Equal Protection Clause when viewed in relation to that function. By imposing a financial obligation only upon inmates of institutions, the statute inevitably burdens many whose appeals, though unsuccessful, were not frivolous, and leaves untouched many whose appeals may have been frivolous indeed.

384 U.S. at 310. See also, Lindsey v. Normet, supra, 405 U.S. at 78.

Strube readily concedes that the deterrence of frivolous

appeals is a legitimate governmental objective. However, the appeal bond rule is too heavy-handed and overbroad a device for achieving that end. In the case sub judice, Strube vigorously maintains that he has a complete defense to the negligence action instituted against him in the Small Claims Court.[4] Yet the bond requirement has precluded him from pursuing what he contends is a totally meritorious appeal. If Marion Small Claims Rule 16(B) does prevent some frivolous appeals, it does so only because it bars all appeals by poor persons.

Rule 16(B) is, at the same time, underinclusive, in that it singles out Marion County Small Claims Court defendant-appellants for its strictures, while other litigants in the state remain undeterred from frivolous appeals.

The most definitive counter to the lower court's suggestion that Rule 16(B) is legitimized by its deterrent effect on Marion County litigants is the fact that the appeal bond rule creates more than a simple geographic disparity in rights. The discriminatory classification created by Rule 16(B) can actually be subdivided into three subclasses: (1) litigants in the Marion County Small Claims Court vis a vis litigants in all other Indiana Courts; (2) litigants in the Marion County Small Claims Court vis a vis litigants in the Marion County civil trial courts; and (3) defendant-appellants vis a vis plaintiff-appellants in the Marion County Small Claims Court. Thus Strube's attack on this rule is not based solely on lack of territorial uniformity.

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[4]The investigating police officer's report indicates that the plaintiff contributed to the circumstances resulting in the accident through "improper driving." (Tr. 18) Contributory negligence is a complete bar to a plaintiff's recovery in Indiana. See for example Huey v. Milligan, 242 Ind. 93, 175 N.E.2d 698, 700 (1961). ("There are no degrees of negligence in Indiana, and if plaintiff. . .was guilty of any negligence, however slight, and such negligence proximately contributed to her injury, she cannot recover.")

The Indiana Court of Appeals suggests one other state interest that may be advanced by Rule 16(B):

> . . .We believe Rule 16(B) affords protection to the successful litigant and insures the recovery of his debt.

Strube, 385 N.E.2d at 952.

Strube concedes that this too is a legitimate state interest. However, for Rule 16(B) to survive Equal Protection scrutiny, it is not sufficient that it simply further a legitimate state interest. There must also be a relationship between the state interest in securing judgments and the classification created by the Rule. Rinaldi, supra. In Rinaldi, in discussing a similar proffered justification for the statute allowing recoupment of costs of appeal transcripts from institutionalized convicts, the court stated:

> We may assume that a legislature could validly provide for replenishing a county treasurey from the pockets of those who have directly benefited from county expenditures. To fasten a financial burden only upon those unsuccessful appellants who are confined in state institutions, however, is to make an invidious discrimination.

Rinaldi, 384 U.S. at 309.

While it is legitimate for the state to promulgate laws or rules securing the judgments of plaintiffs, there is no reason to subject only Marion County Small Claims defendant-appellants, and no other litigants in the state, to the beneficent effects of such a rule.

An additional flaw in the argument that Rule 16(B) serves the legitimate state interest of securing judgments rests on the fact that in many cases, including the instant case, the appeal bond requirement does not improve the judgment creditor's chance of collecting his judgment, nor would the absence of the rule diminish the chance of collection. An appeal without bond in Indiana will not stay enforcement of the judgment. Hayes Freight Lines, Inc. v. Oestericher, 117 Ind. App. 143,

68 N.E.2d 792 (1946). In the absence of a bond requirement, Sumner is still free to pursue his remedies supplemental during the pendency of this appeal. In light of Strube's inability to post a bond, Rule 16(B) does not improve Sumner's chances for collecting his judgment. The Rule's only effect in the instant case is to bar Strube from perfecting an appeal.

In a case somewhat similar to the instant case, Caulk v. Nichols, 281 A.2d 24 (Del., 1971), App. dis., 408 U.S. 901 (1971), the Delaware Supreme Court upheld a statute which required justice of the peace defendants to post a bond in order to appeal, against plaintiff's contention that the statute arbitrarily discriminated against him vis a vis superior court litigants, justice of the peace plaintiffs, and non-indigent justice of the peace defendants.

In that case, the Delaware Court suggested several possible justifications for the distinctions created by the Delaware statute. The similarity of the Caulk case to the instant case compells appellant to address the justifications there advanced.

The court in Caulk suggests that the differential treatment accorded superior court and justice of the peace court appellants may be justified by the fact that on appeal the justice of the peace appellant receives a trial de novo.

> Thus, a loser before a Justice of the Peace has an advantage over his counterpart in a Superior Court case, in that he has two chances to obtain a favorable decision on the evidence.

Caulk, at 27.

Strube would contend that the advantage which the Delaware Court sees in a trial de novo is illusory where the defendant is precluded from any appeal by his inability to meet a bond requirement.

The Delaware Court also states that it fails to see how the appeal bond rule discriminates against defendants vis a vis

plaintiffs. Contrary to the court's assertion, the discrimination claimed is obvious -- defendants must overcome a financial barrier in order to appeal; plaintiffs need not.

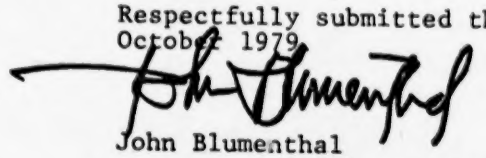
In any event, the Caulk case is distinguishable from the instant case in that the justice of the peace system examined there was statewide, and not confined to a single county. To a much greater extent than in Caulk, Strube is singled out and disadvantaged relative to the mainstream of the state's judicial process.

Strube contends that under any level of equal protection scrutiny, no government interest can be put forward which can relate to the classifications created by Marion County Small Claims Rule 16(B). For this reason, the rule should be stricken as an infringement of Strube's rights under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

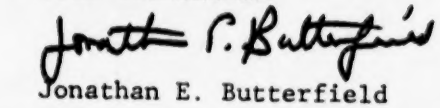
CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted this 22nd day of October 1979.



John Blumenthal



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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5532

ORIGINAL COPY

HAROLD STRUBE, Appellant,

ORIGINAL COPY

v.

DALE SUMNER, Appellee.

ON APPEAL FROM THE SUPREME COURT

OF INDIANA

MOTION TO DISMISS

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INDEX

	Page
Table of Authorities Cited	ii
Motion to Dismiss	1
Jurisdiction	2
Question Presented	2
Statutory Provisions and Rules	2
Statement of the Case	4
Argument	4
A. This Appeal from the Supreme Court of Indiana Should be Dismissed for Want of Jurisdiction Because Not Taken in Conformity to 28 U.S.C. § 1257(2)	4
B. Marion County Small Claims Court Rule 16(B), Requiring an Appeal Bond for de novo Appeals, is Justified by the Fact That de novo Appeals Are Available From No Other Court in Indiana; It Is Rationally Related to the Legitimate State Purpose of Deterring Frivolous Appeals and Does Not Contravene the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; The Effect of the Rule is Easily Avoided by Defendant's Request for Transfer to a Court of Record and a Jury Trial; Therefore, Any Potential for Discriminatory Impact in the Rule Clearly Does Not Rise to the Level of a Substantial Federal Question	6
Conclusion	13
Appendix 1	A-1

TABLE OF AUTHORITIES CITED

Cases

	Page
American Railway Express Co. v. Levee, 263 U.S. 19 (1923)	5
Caulk v. Nichols, 281 A.2d 24, (Del. 1971) appeal dismissed, 408 U.S. 901 (1972)	8,11
Cleland v. National College of Business, 435 U.S. 213 (1978)	10
Griffin v. Illinois, 351 U.S. 12 (1956)	12
Hammerstein v. Superior Court, 341 U.S. 491 (1951)	5
Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968)	5
Jones v. Aciz, 109 R.I. 612, 289 A.2d 44 (1972); appeal dismissed sub nom. Phillips v. Housing Authority, 409 U.S. 1094 (1972)	11
Lindsey v. Normet, 405 U.S. 56 (1972)	12
Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954)	5
Ortwein v. Schwab, 410 U.S. 656 (1973)	12
Randall v. Board of Commissioners of Tippecanoe County, Indiana, 261 U.S. 252 (1923)	5
San Antonio School District v. Rodriguez, 411 U.S. 1 (1973)	11
Sullivan v. Texas, 207 U.S. 416 (1908)	5
United States v. Kras, 409 U.S. 434 (1973)	12

Constitutional Provision

United States Constitution, Fourteenth Amendment, Section I	Passim

Statutes and Rules

Statutes:	Page
28 U.S.C. §1257(2)	2,5
Judicial Code § 237 (Act March 3, 1911, c. 231, 36 Stat. 1156, Comp. Stat. 1916 § 1214),	5
Indiana Code	
IC 33-4-1-7.1	6
IC 33-4-1-24.1	6
IC 33-4-1-81.1	6
IC 33-11.6-1-1, et seq.	6
IC 33-11.6-1-3	6
IC 33-11.6-1-4	7
IC 33-11.6-4-5	7
IC 33-11.6-4-9	7
IC 33-11.6-4-10	9
IC 33-11.6-4-14	7

Michigan Codified Laws Annotated
MCLA § 600, 8412 8

Rules:

Indiana Rules of Appellate Procedure
(Rule 6(B) 7

Marion County Small Claims Court Rules
Rule 5 8
Rule 13. 9
Rule 16 (B). . . . . Passim

Supreme Court Rules
Rule 16 (1), subsection (a) and (b). 1

Other Documents:

Appellant's Appendix at 9 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5532

HAROLD STRUBE, Appellant,

v.

DALE SUMNER, Appellee.

ON APPEAL FROM THE SUPREME COURT

OF INDIANA

MOTION TO DISMISS

Pursuant to Rule 16(1), subsections (a) and (b), of the Rules of the Supreme Court of the United States, Appellee moves the Court to dismiss the appeal herein on the ground that it is not within the jurisdiction of this Court because not taken in conformity with statutory requirements, and on the further ground that it does not raise a substantial federal question.

JURISDICTION

The jurisdiction of this Court is claimed under 28 U.S.C. § 1257(2) which reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

It affirmatively appears from the record that Appellant is appealing from the Supreme Court of Indiana when he should be appealing from the Indiana Court of Appeals in order to properly invoke jurisdiction of this Court pursuant to 28 U.S.C. § 1257(2). (See Appellant's Jurisdictional Statement, page 1).

QUESTION PRESENTED

Whether Marion County Small Claims Court Rule 16(B), which requires a litigant to post a bond in the amount of the judgment, plus interest and costs, as a prerequisite to appeal for de novo review, satisfies the requirements of the Equal Protection Clause of the 14th Amendment of the United States Constitution by serving a legitimate state purpose, when the litigant is also afforded the right to transfer the case to a trial court where no bond is necessary to perfect an appeal but from which de novo review is unavailable.

STATUTORY PROVISIONS AND RULES

In addition to Section I, Fourteenth Amendment, United States Constitution and 28 U.S.C. § 1257(2), the only provisions of law involved in this case are provisions of the Indiana Code and Rules of Practice and Procedure of the Small Claims Court of Marion County, Indiana, as follows:

IC 33-11.6-4-5

ADOPTION OF RULES

The judge of the circuit court, assisted by the judges of the small claims court, shall make and adopt uniform rules for conducting the business of the small claims court and for appeals therefrom according to a simplified procedure and in the spirit of sections 6[33-11.6-4-6] and 8[33-11.6-4-8] of this chapter.

IC 33-11.6-4-10

WAIVER OF TRIAL BY JURY

The filing of a civil claim in the small claims court shall be deemed a waiver of trial by jury by the plaintiff. The defendant in such case shall be deemed to have waived his right to trial by jury unless he requests such a trial prior to the commencement of the trial of the case in the small claims court. At the time of such request the small claims court shall transfer the claim to the circuit, superior or municipal courts of the county in which the small claims court is located. The defendant shall pay all costs necessary for filing the claim in the circuit or superior courts as if the cause had initially been filed in that court.

IC 33-11.6-4-14

APPEALS

All appeals from judgments of the small claims court shall be taken to the circuit or superior courts of the county and tried de novo. All appeals from proceedings under IC 1971, 33-11.6-6 shall be taken to a criminal court of the county and tried de novo. Rules of procedure for appeals shall be in accordance with the rules established by the circuit court.

IC 33-11.6-4-14
(amended effective January 1, 1979)

APPEALS

All appeals from judgments of the small claims court shall be taken to the circuit or superior court of the county and tried de novo. Rules of procedure for appeals shall be in accordance with the rules established by the circuit court.

Marion Small Claims Rule 5

COUNTERCLAIMS

(A) If the defendant has any counterclaim arising from the same transaction or occurrence which is the subject matter of the plaintiff's claim, and which is within the jurisdictional limits of the Court, he may bring or mail a statement of such claim to the small claims Court within such time as will allow the Court to mail a copy to the plaintiff and be received by him at least seven (7) calendar

days prior to the hearing. If such counterclaim is not received within this time the plaintiff may request a continuance pursuant to M.S.C. 9.

(B) Counterclaim in excess of jurisdiction. The defendant in a counterclaim may waive the excess of his claim over the jurisdictional maximum to bring it within the jurisdiction of the small claims docket. If the defendant elects to waive a portion of his counterclaim, he may not later maintain a separate action, for the remainder of such claim.

Marion Small Claims Rule 13

TRANSFER TO MUNICIPAL COURT FOR JURY TRIAL

(A) Where a defendant has requested a trial by Jury pursuant to 1971 IC 33-11.6-4-10 said cause shall be transferred to the Municipal Court of Marion County for trial. The defendant shall pay all costs necessary for filing the claim in said court as if the cause had initially been filed in said court.

(B) Upon the transfer of said cause the Judge shall transmit all papers to the Clerk of the Marion Municipal Court along with the applicable costs within twenty (20) days from the date of such filing of such request, with tendered costs.

Marion Small Claims Rule 16

APPEALS

(B) Appeal Bond. The appellant shall, except in cases where the same is dispensed with by law, file with the court a bond, with security to be approved by the judge, payable to the appellee, in a sum sufficient to secure the claim of the appellee and interests and costs, conditioned that he will prosecute his appeal to effect, and pay the judgment that may be rendered against him in the circuit court.

The Rules of Practice and Procedure of the Small Claims Court may be found in Appendix 1 of this Motion to Dismiss.

STATEMENT OF THE CASE

Appellant's Statement of the Case is substantially correct and complete. Any errors or omissions will be treated in the Argument section of Motion to Dismiss.

ARGUMENT

A.

THIS APPEAL FROM THE SUPREME COURT OF INDIANA SHOULD BE DISMISSED FOR WANT OF JURISDICTION BECAUSE NOT TAKEN IN CONFORMITY TO 28 U.S.C. § 1257(2)

The statute conferring jurisdiction on this Court to review final judgments of state courts where the validity of a state statute is questioned on the ground of its repugnancy to the Constitution, and the decision upholds its validity, requires that the appeal be taken from . . . "the highest court of the State in which a decision could be had. . . ." 28 U.S.C. § 1257(2).

The Indiana Court of Appeals rendered its opinion in this case on December 20, 1978, and denied appellant's Petition for Rehearing on April 17, 1979. Appellant then petitioned for transfer of the case to the Supreme Court of Indiana, which petition was denied on July 23, 1979, without reason or opinion for that denial (Appendix "A" to the Jurisdictional Statement at 9).

This Court has consistently held that when the highest court of a state (here the Supreme Court of Indiana) declines to exercise its authority, only the judgment of the intermediate court (here the Indiana Court of Appeals) is reviewable under 28 U.S.C. § 1257. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 678, n. 1 (1968); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 160 (1954); Hammerstein v. Superior Court, 341 U.S. 491, 492 (1951); American Railway Express Co. v. Levee, 263 U.S. 19, 20-21 (1923); Sullivan v. Texas, 207 U.S. 416, 422 (1908).

In Randall v. Board of Commissioners of Tippecanoe County, Indiana, 261 U.S. 252 (1923), this Court considered a case presenting an almost identical procedural history to that of the case at bar. This Court held that it must dismiss a writ of error to the Supreme Court of Indiana because the writ clearly should have been issued to the intermediate appellate court. The statutory basis for the dismissal was Judicial Code § 237, (Act March 3, 1911, c. 231, 36 Stat. 1156, Comp. Stat. 1916 § 1214), the precursor of the current 28 U.S.C. § 1257, and identical to § 1257 in every pertinent respect.

It is abundantly clear from the record that Appellant, by presenting this appeal from the Indiana Supreme Court

rather than the Indiana Court of Appeals, is appealing from the wrong court and, therefore, the order denying transfer by the Supreme Court of Indiana is not reviewable by this Court. Accordingly, this Court is without jurisdiction in this case and the appeal should be dismissed.

B.

MARION COUNTY SMALL CLAIMS COURT RULE 16(B), REQUIRING AN APPEAL BOND FOR DE NOVO APPEALS, IS JUSTIFIED BY THE FACT THAT DE NOVO APPEALS ARE AVAILABLE FROM NO OTHER COURT IN INDIANA; IT IS RATIONALLY RELATED TO THE LEGITIMATE STATE PURPOSE OF DETERRING FRIVOLOUS APPEALS AND DOES NOT CONTRAVENE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION; THE EFFECT OF THE RULE IS EASILY AVOIDED BY DEFENDANT'S REQUEST FOR TRANSFER TO A COURT OF RECORD AND A JURY TRIAL; THEREFORE, ANY POTENTIAL FOR DISCRIMINATORY IMPACT IN THE RULE CLEARLY DOES NOT RISE TO THE LEVEL OF A SUBSTANTIAL FEDERAL QUESTION

Special handling of small claims cases is a relatively new phenomenon in Indiana. In the early 1970's, various acts of the Legislature provided for the establishment of "small claims dockets" in the circuit courts of Brown, Franklin and Union Counties. IC §§ 33-4-1-7.1, 33-4-1-24.1, 33-4-1-81.1. Simplified procedures were to be used for these dockets, but no de novo review was available and no appeal bonds were required to perfect appeals, although if posted, they acted to stay the execution of judgments. In 1971, the Indiana Legislature enacted IC § 33-11.6-1-1 et seq., the comprehensive law "establishing a small claims court in each county containing a consolidated city of the first class." IC § 33-11.6-1-3. As of the 1970 census, Indianapolis was the only city of sufficient size to constitute a consolidated city of the first class; therefore, Marion County is the only county to date which has established a small claims court pursuant to this legislative enactment. At the present time, there are no other small claims courts in Indiana of this nature.

Unlike the county courts which have small claims dockets, the Marion County Small Claims Court is not a court of record, nor there is provision for a trial by jury. IC § 33-11.6-1-4, IC § 33-11.6-4-9. Appeal from a judgment of the Marion County Small Claims Court is by de novo review in the county superior or circuit court. IC § 33-11.6-4-14. Pursuant to IC § 33-11.6-4-5, the Judge of the Marion County Circuit Court, assisted by Judges of the small claims court, adopted uniform rules for the small claims court and for appeals therefrom, effective January 1, 1976. (See Appendix 1 to this Motion to Dismiss).

Marion County Small Claims Court Rule 16(B) requires the posting of an appeal bond to perfect an appeal from a judgment rendered in that court. Appellant could not afford an appeal bond and his appeal from an adverse judgment of the small claims court was dismissed. In essence, he claims the requirement of an appeal bond from the small claims court is unfair because no other appellants from other Indiana courts are required to post bond to perfect an appeal.

It is true that appeals from all other trial courts in Indiana are governed by Rule 6(B) of the Indiana Rules of Appellate Procedure, which provides in pertinent part: "No appeal bond shall be necessary to perfect an appeal from any judgment or appealable interlocutory order." But there is good reason for the difference in the rules for appeal.

Communities throughout the country in recent years have created small claims courts in an effort to relieve the regular trial courts of heavy calendars and, in some instances, serious backlogs. By simplifying and deformalizing procedures, small claims courts have been able to offer speedier justice to more litigants. The simplified procedures have allowed litigants to prosecute small claims without counsel; claims which would otherwise be economically unfeasible to pursue because of attorney fees and court costs. Litigants

in the Marion County Small Claims Court are permitted representation by counsel, which representation this Appellant had. Litigants in the small claims courts of some states, Michigan, for example, waive the right to counsel, trial by jury, and appeal when a litigant makes the decision to remain in that court. MCLA § 600.84 12. Parties who choose to litigate in a small claims court, such as that of Marion County, relinquish some of the advantages and safeguards of a regular court in exchange for the advantages of less expense and speedier dispute resolution. It is the right to one's day in court, not the right to appeal, which is fundamental and protected by the Constitution.

Appellant contends that he was forced, by Appellee's choice of forum, into a small group of litigants who must post bond to perfect an appeal. But this is patently erroneous. The plaintiff initially chooses the Marion County Small Claims Court, and in so doing, waives the right to trial by jury and agrees to abide by the procedures and rules of the court, including the appeal bond rule. Contrary to Appellant's contention, the appeal bond rule applies equally to plaintiff-appellants who lose defending a counterclaim and wish to appeal. Inasmuch as counterclaims are permitted pursuant to Marion County Small Claims Court Rule 5, plaintiffs also risk the appeal bond requirement when they choose to litigate in the simpler forum. There is no rationale behind a rule that would require a losing plaintiff, against whom no counterclaim was filed, to post bond to perfect an appeal, as there would be no judgment to secure. There is no discrimination in the requirement that an unsuccessful defendant or a plaintiff who loses on a counterclaim post an appeal bond to secure the judgment. Caulk v. Nichols, 281 A.2d 24, 26-27 (Del. 1971), appeal dismissed, 408 U.S. 901 (1972).

In recognition of the inherent drawbacks to the simplified procedures of small claims courts, the Marion County Small Claims Court has been structured so that no party can be forced by an opponent to litigate a case in the small claims court. After the initial choice by the plaintiff to litigate his claim in the small claims court, the defendant must assess the advantages and disadvantages to him of litigating the case there rather than in the Municipal Court of Marion County. If a defendant's decision is to litigate the case in the Municipal Court (from which no appeal bond is required to perfect an appeal), he need only inform the small claims court of that intention before trial, and the case will be transferred to the Municipal Court of Marion County for trial by jury. IC § 33-11.6-4-10; Marion County Small Claims Court Rule 13. Inasmuch as Appellant was represented by counsel at trial in the Marion County Small Claims Court, it is presumed that said counsel informed Appellant of this right.

It has been established, then, that Appellant was not forced by Appellee into the position that he post an appeal bond to perfect his appeal from the Marion County Small Claims Court. He must be deemed legally to have chosen that position as part of his calculated risk in choosing to remain in small claims court. Nevertheless, he is in a category of appellants apparently different from all other appellants perfecting appeals from Indiana Courts. No other Indiana appellants are required to post bond to perfect an appeal. But it is equally true that no other Indiana appellants receive de novo review of their cases on appeal, a valuable right guaranteed to small claims court appellants. This distinction alone is justification for the difference in appeal rules.

But a more compelling reason for the difference in appeal rules is the deterrent effect the appeal bond rule can have on frivolous appeals. Appellant admits that this purpose is a legitimate governmental objective, but suggests that the appeal bond also deters meritorious appeals by those who cannot or will not post bond. [See Jurisdictional Statement at 17 et seq.] Appellee admits that the deterrent is not a perfect

one, but it is rationally related to its purpose and is presently the best available deterrent. Unless a fundamental interest or suspect classification is at issue, a classification having some reasonable basis does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. Cleland v. National College of Business, 435 U.S. 213 (1970).

Because small claims court litigation is quick, easy, and inexpensive, many claims which would otherwise be settled out of court or simply dropped may be filed in that forum if the opportunity is available. This is equally true of counterclaims. Therefore, it is expected that a higher percentage of frivolous claims and counterclaims may be brought in small claims court as compared with the municipal or superior courts. Appellate review of a trial court decision, whether rendered by court or by jury, is usually limited to an error in law or abuse of discretion. But an appeal from the Marion County Small Claims Court receives de novo review, which allows the litigants to again try the merits of the case. Thus, an unimpeded right to a retrial on the merits opens the door to frivolous and insubstantial claims by unsuccessful small claims court litigants who desire another opportunity to obtain a favorable decision.

A deterrent to frivolous claims is needed. The posting of an appeal bond in the amount of the judgment, plus costs, is a reasonable and effective deterrent which not only serves a legitimate governmental interest, but also protects and insures the judgment of the successful party. As stated above, the appeal bond requirement can be avoided by a small claims court litigant, be he plaintiff or defendant, simply by requesting removal of the case to the Municipal Court of Marion County for trial by jury.

Although the Indiana Court of Appeals and Appellant have stated that there is no contention of wealth discrimination, it is apparent that Appellant is also challenging the appeal bond rule because his indigency caused it to adversely affect him. If appellant had removed his case to the Municipal Court of Marion County so as to avoid the appeal bond rule, he could have petitioned for leave to proceed in forma pauperis just as he did, successfully, when he attempted to appeal the small claims court decision, and as he seeks to do before this Court. Appellant had a choice of alternatives; it was not unfair to require him to make that choice. Where wealth is involved, the equal protection clause does not require absolute equality or precisely equal advantages. San Antonio School District v. Rodriguez, 411 U.S. 1 (1973).

The Supreme Court of Rhode Island has upheld a similar appeal bond requirement when challenged by indigents' claims that it violated their right to equal protection. Moreover, there was no indication that the indigents there could have avoided the appeal bond rule as Appellant could have done in this case. Jones v. Aciz, 109 R.I. 612, 289 A.2d 44 (1972). This Court dismissed the appeal sub nom. Phillips v. Housing Authority, 409 U.S. 1094 (1972). This Court also dismissed, for want of a substantial federal question, a similar case wherein the Supreme Court of Delaware upheld the appeal bond requirement of the Justice of the Peace Courts of Delaware when challenged on several equal protection grounds. Caulk v. Nichols, supra. The case at bar presents no more substantial federal question.

The appeal bond rule is rationally related to the valid state purpose of deterring frivolous appeals and serves that purpose well. Although Appellant contends that it imposes an unfair and heavy burden on poor people who cannot meet its requirements, the option of litigating in the Municipal Court of Marion County to avoid the rule is always available by merely requesting a trial by jury. The benefits of the rule as a deterrent to frivolous claims outweigh its

drawbacks, and, until a more effective deterrent is available, it must be allowed to stand.

Appellant asserts that since the rule affects the "administration of justice" it should be subjected to a more exacting level of equal protection scrutiny than mere rationality. But upon examination, Appellant's argument is specious. No suspect classification is involved here, nor is there present the invidious discrimination proscribed by the equal protection clause of the Fourteenth Amendment. Appellant is a member of a de facto class of litigants in the Marion County Small Claims Court. Contrary to Appellant's contention, there is no fundamental interest involved here which would require a higher level of scrutiny of the appeal bond rule. Lindsey v. Normet, 405 U.S. 56 (1972). This is a civil case, and Appellant has a fundamental right of access to the courts, which he received. He has no fundamental right to a retrial on the merits, nor does he have a fundamental right to any appeal at all. Appellant could have appealed if he had posted bond; moreover, he could have appealed without posting bond if he had removed the case to the Municipal Court of Marion County for jury trial. No more is required by the Constitution. Griffin v. Illinois, 351 U.S. 12 (1956). The applicable standard in this case is rationality, and that clearly has been met. Ortwein v. Schwab, 410 U.S. 656 (1973); United States v. Kras, 409 U.S. 434 (1973).

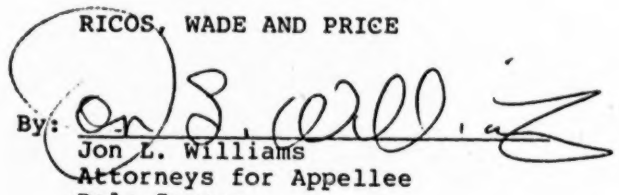
Appellant has not been fundamentally wronged or discriminated against unfairly. He raises no issues which approach the level of a substantial federal question. The rule of which he complains well serves a valid state purpose, is extremely limited in its impact, and can be avoided by any litigant simply by choosing to litigate the case in the Municipal Court of Marion County. The Indiana Supreme Court saw no reason to review the obviously correct opinion of the Indiana Court of Appeals, and there is no reason for this Court to grant further review.

CONCLUSION

Appellee respectfully submits that this case is not a proper one for review by this Court, and that this appeal should be dismissed for want of jurisdiction because not taken in conformity with statutory requirements and for want of a substantial federal question.

Respectfully submitted,

RICOS, WADE AND PRICE

By: 
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